IN THE SUPERIOR COURT OF WARE COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
v.	)	Indictment No. 04R-330
SHEILA DENTON,	)	
Defendant.	)	

ORDER GRANTING EXTRAORDINARY MOTION FOR NEW TRIAL

Before the Court is Sheila Denton's Extraordinary Motion for New Trial. The Court has heard evidence, argument, and reviewed the briefs from Mrs. Denton and the State. It is noted that Mrs. Denton's presence was waived for the hearing on the motion.

Upon conviction for the murder of Eugene Garner, the Defendant filed a motion for new trial, which was denied by the trial court. A direct appeal followed which was affirmed, Denton v. State , 286 Ga. 494; 689 S.E. 2d 322 (2010).

The issues before the Court surround the legitimacy of forensic bite mark evidence. Specific to Mrs. Denton's case is whether advancements in scientific knowledge regarding bite mark evidence are new evidence warranting the relief sought. The advancements at issue are changes to the ABFO (American Board of Forensic Odontology) guidelines which occurred in 2016. The undisputed evidence at present is that the advancements, scientific understanding and ABFO guidelines would compel a different expert opinion if the case were tried today. Thusly, the seminal question before the Court is whether a change in the expert opinion testimony of a

key trial witness, resulting from changes in scientific knowledge and understanding as expressed and contained in the ABFO guidelines is newly discovered evidence.

The Defendant in this case, Sheila Denton, was convicted of murder and sentenced to life in prison in 2006. The evidence against her at trial included testimony by forensic dentist Thomas David, who opined that a bite mark on Denton was probably caused by the victim's teeth and that a probable bite mark on the victim was probably caused by Denton. (T. 145-80.)[1] At the time of Denton's trial, such testimony was accepted as the product of a credible forensic science discipline.

On November 8, 2017, Denton filed an extraordinary motion for new trial, alleging that recent developments in the understanding of the limitations of bite mark analysis and comparison demonstrate that the testimony today would no longer be inculpatory. An evidentiary hearing was held before this Court on May 29, 2018. The Court then invited post-hearing briefing.

Having carefully considered the evidence that was presented at the 2006 trial, the 2018 hearing, and the parties' briefs, for the reasons that follow, Denton's motion is **GRANTED**.

I. The Legal Standard

To prevail on her extraordinary motion for new trial, Denton must satisfy the six-factor test elucidated in *Timberlake v. State*, 246 Ga. 488 (1980). Specifically, she must satisfy this Court "(1) that the evidence has come to [her] knowledge since the trial; (2) that it was not owing to the want of due diligence that [she] did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a

[1] Citations to "T. __" refer to the 2006 trial transcript from this case. Citations to "E.M.N.T. __" refer to the transcript from the 2018 hearing on the extraordinary motion for new trial.

new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness." *Id.* at 491.

In granting the extraordinary motion, this Court is cognizant that motions for new trial filed pursuant to O.C.G.A. § 5-5-41(b) are an extraordinary remedy. *Mitchum v. State*, No. S19A0554, 2019 WL 4924049, at *2 (Ga. Oct. 7, 2019).

II. Findings of Fact

At the hearing, Denton presented the live testimony of three forensic dentists—Dr. Thomas David, Dr. Cynthia Brzozowski, and Dr. Adam Freeman. All three experts are Board-Certified Diplomates of the American Board of Forensic Odontology ("ABFO"). The ABFO is the country's only board-certifying entity for forensic dentists. (E.M.N.T. 42, 143, 198.) Their testimony unanimously established that Denton is entitled to a new trial.

Dr. David, who testified against Denton at her trial, admitted that if he testified at Denton's trial today, his testimony would be different, following advances in the scientific understanding of the limitations of bite mark evidence that are reflected in the recent change in ABFO Guidelines. (E.M.N.T. 126, 129-30.) Dr. Brzozowski and Dr. Freeman agreed with that assessment. (E.M.N.T. 165-66, 238.) In addition to these live witnesses, Denton also filed, in advance of the hearing, two affidavits, co-authored by a total of five Board-Certified ABFO Diplomates. The first affidavit was co-authored by Dr. Brzozowski, Dr. Anthony Cardoza, and Dr. James Wood; the other was co-authored by Dr. Freeman and Dr. Iain Pretty. Each of the experts agreed that the trial testimony would not be incriminating today based on advances in scientific understanding.

This consensus follows the 2016 change in ABFO Guidelines, which were described as "very significant" (E.M.N.T. 161), and a "seminal moment in the ABFO and a quantum leap"

(E.M.N.T. 235). Thus, this Court was presented with unanimous expert opinion that the bite mark evidence presented at trial against Denton would not be incriminating today. The Court found the experts and evidence Denton presented, which challenged the reliability of the bite mark evidence presented at Denton's trial based on new scientific developments, to be credible.

A. The Evidence at Trial

On May 21, 2004, the body of Eugene Garner was discovered inside of his home at 1638 ABC Avenue, in Waycross, Georgia. (T. 71, 76, 270.) Observation of the scene indicated that a struggle had occurred. (T. 88, 115, 129, 374.) The autopsy revealed that the cause of Garner's death was "blunt force head trauma in conjunction with manual strangulation." (T. 311.)

Denton was arrested for giving police officers a false name during a stop that occurred around midnight on the day Garner's body was found. (T. 360, 366.) She was subsequently charged for his murder. At trial, forensic dentist Dr. David testified that an injury found on Denton was a bite mark "to a reasonable scientific certainty," and an injury found on Garner was "probabl[y]" a bite mark. (T. 154.) Dr. David further opined, "to a reasonable degree of scientific certainty," that "Denton was the probable source of the bite mark on Mr. Garner and that Mr. Garner was the probable source of the bite mark on Denton." (T. 159, 167.)

Aside from the bite mark evidence, the State presented little other incriminating evidence. An analyst from the Georgia Bureau of Investigation's Division of Forensic Sciences testified concerning "hairs that were identified as recovered from the victim's hand" at the scene. (T. 183.) She compared those hairs to "known head hairs" from both the decedent and Denton. (T. 183.) The analyst testified that "the questioned hair in the victim's hand matched his own head hair." (T. 187-88.) No hair matching Denton was found at the scene.

The State presented a witness, Sharon Jones, who was an admitted drug addict and crack cocaine dealer with a criminal record. Jones testified that at approximately 4:30 a.m. one day in May of 2004, Denton came to a known crack house where Jones was guarding about $500 worth of crack cocaine. (T. 336-38, 352.) Jones admitted on the stand that she had been smoking a lot of crack cocaine that night, such that days would bleed into one another, making her unable to really say what else had happened that evening. (T. 346-47.) Jones claimed that Denton had cuts on her arms and legs, and Denton told Jones that she "just killed the man that stay in front of Walley's." (T. 336-38.) Jones testified that Denton gave no other information about the murder. (T. 338.) Jones testified that she did not believe Denton's claim that she had killed someone, and instead Jones thought that Denton had been scratched after falling into some bushes. (T. 338-39, 348.) According to Jones, she then sold Denton some crack cocaine. (T. 339.)

Jones testified that when she initially spoke with police, she did not tell the questioning officers any information incriminating Denton. Instead, Jones's account of Denton's alleged admission came only after an interrogation during which two police officers "kept saying I did it." (T. 342.) The interrogation, as retold by Jones at trial, then went as follows:

> A. They tried to say -- well, [Officer] Larry Hill said he had my fingerprints at the house and he had a tape, videotape with me there, which I knew wasn't true.
>
> . . .
>
> Q. Okay. He said you were involved?
>
> A. He said he had my fingerprints at that house.
>
> Q. Right.
>
> A. And a videotape with me being there.
>
> . . .

Q. Did he tell you he was going to put you in jail if you didn't make a statement to him about it?

A. Uh-huh (positive response).

. . .

Q. And he showed you a blank tape and told you he had a videotape of you at Mr. Garner's house involved in something?

A. Uh-huh (positive response).

Q. And he was going to put you in jail?

A. Yes, sir.

(T. 344-45.) Jones's trial testimony concluded with her admitting that she lied to the police three different times. (T. 354.) None of the other witnesses at trial provided testimony linking Denton to the crime.

B. Dr. Cynthia Brzozowski and Dr. Adam Freeman

At the May 2018 evidentiary hearing, Denton called three experts, including Dr. Brzozowski and Dr. Freeman. The Court finds that Dr. Brzozowski and Dr. Freeman were forthcoming and credible in their testimony.

Dr. Brzozowski received her doctor of medical dentistry from the University of Boston Dental School in 1986, completed a residency program at the Veteran's Administration the following year, has been a fellow with the American Academy of Forensic Sciences since 1994, has been a member of the American Society of Forensic Odontology since 1992, and has served on the board of American Board of Forensic Odontology for three terms. (E.M.N.T. 142-44.)

Dr. Freeman graduated from dental school at Columbia University, completed a fellowship at the University of Texas, is a consultant for the Connecticut Medical Examiner, and has consulted with the FBI. (E.M.N.T. 196-97.) He has served as president, vice-president, and

secretary of the ABFO and has chaired the bite mark and metrology committees. (E.M.N.T. 198.)

Drs. Brzozowski and Freeman testified that they came to testify before this Court out of what they termed their "ethical" and "civic" duty. (E.M.N.T. 149, 203.) They did so without being paid for their work, and each suffered a financial loss to be away from their respective practices to testify. (E.M.N.T. 149, 203.) They both testified that at one point in their careers in forensic dentistry they believed bite mark evidence could be probative in court. But advances in understanding, recent scientific studies, the lack of proficiency testing, and the growing number of wrongful convictions attributable to bite mark evidence led them to see the error of their past beliefs. (E.M.N.T. 149-50, 246-47.) Their testimony was devoid of self-interest bias.

Dr. Brzozowski candidly admitted that when she became a member of the ABFO in 2006, she believed that bite mark analysis was based on valid science; however, she no longer does. Dr. Brzozowski testified:

> I think there are several contributing factors that have shaped my opinion over the last decade. The first being that we have no scientific studies to validate accuracy and reliability of bite mark methods. We actually have studies that show the unreliability of bite mark methods, but we have none to show the reliability and the accuracy.
>
> Two, there have been three independent scientific panels who have come to the same conclusion, that being the Texas Forensic Science Commission, the PCAST and the National Academy of Sciences.
>
> Three, the failure of the ABFO to initiate and conduct such studies to validate their methods. And lastly, the increasing number of wrongful convictions that have been largely unaddressed by the ABFO.

(E.M.N.T. 149-50.) She then testified that at the time of Denton's trial, individualization and probabilistic testimony[2] from forensic dentists was supported by the ABFO. (E.M.N.T. 153.) In 2016, however, in response to the factors that Dr. Brzozowski referenced in her testimony, the range of permissible associations changed. (E.M.N.T. 153.)

Dr. Brzozowski testified that at a threshold level, when determining the nature of the injury, "probable bite mark"—the characterization Dr. David provided at trial for the injury to Garner—is no longer a permitted conclusion by the ABFO Guidelines. (E.M.N.T. 157-58.) Dr. David's remaining trial testimony in this case was inconsistent with today's scientific understanding of bite marks as well. (E.M.N.T. 165.) "He testified that Ms. Denton was the probable biter of Mr. Garner and that Mr. Garner was the probable biter of Ms. Denton. And today we would not testify as to a probabilistic association." (E.M.N.T. 165.) Rather, the strongest conclusion that could be offered today would be "that one could not exclude that individual as being the source." (E.M.N.T. 165.)

Dr. Brzozowski further testified that she reviewed photographs of the evidence in this case and determined that there was "insufficient information to determine that either of these injuries are human bite marks." (E.M.N.T. 170.) Accordingly, Dr. Brzozowski would not make any comparisons between the injuries and any dentition under today's Guidelines. (E.M.N.T. 173.)

The Court also credits Dr. Brzozowski based on her demeanor. She testified that this testimony was not easy for her to give, telling the Court that she took "pride in being a diplomate of the ABFO . . . invested 12 years in [the] organization. But the failure of the ABFO to address the impact of scientifically invalidated bite mark methods on people's lives and liberty causes

[2] "Individualization" and "probabilistic association" are conclusions that "an individual is responsible or more likely than not responsible for inflicting a bite to the exclusion of all other potential sources." (E.M.N.T. 152-53.)

[her] great concern." (E.M.N.T. 177.) The Court notes that this statement was consistent with Dr. Brzozowski's demeanor in court. It was clear to the Court that it was difficult for Dr. Brzozowski to testify and that she felt a professional obligation to do so. The Court finds her testimony credible.

Dr. Freeman corroborated Dr. Brzozowski's testimony. Dr. Freeman testified that he became a member of the ABFO in 2009, and eventually served as the president of the organization in 2016. (E.M.N.T. 198.) When he first began studying bite marks in 2003, he learned about individualization and probabilistic testimony, and accepted such testimony at the time as based on valid science. (E.M.N.T. 204-05.) However, Dr. Freeman no longer holds that belief today. (E.M.N.T. 237.) Dr. Freeman testified that his belief changed, in large part, after the results of a study he conducted, along with Dr. Pretty, called the Construct Validity Test. The Construct Validity Test was designed to answer the following threshold question in bite mark analysis: whether Board certified odontologists could reliably determine if an injury is a bite mark or not. (E.M.N.T. 217-19.) He testified that the study revealed that the answer is no: "there was a wide spread disagreement about what constituted a bite mark." (E.M.N.T. 214.) Dr. Freeman testified that, in part because of his Construct Validity Study, the ABFO Guidelines changed to reject probabilistic testimony. (E.M.N.T. 235.) He classified this change as a "seminal moment" and a "quantum leap." (E.M.N.T. 235.)

Dr. Freeman testified that he reviewed the bite mark evidence in Denton's case, as well as Dr. David's testimony. (E.M.N.T. 237-38, 242.) He further testified that—under the current ABFO Guidelines—Dr. David's trial testimony concerning probability would be "a misrepresentation of what the underlying science supports." (E.M.N.T. 238.) Dr. Freeman testified that it was his expert opinion that neither mark in Denton's case constituted a bite mark.

(E.M.N.T. 243-46.) Dr. Freeman presented credibly and answered questions in a clear and unbiased manner. His tone and demeanor indicated that he had genuine concern about errors in the use of bite mark evidence and that he felt a professional obligation to inform the Court about those concerns. The Court credits Dr. Freeman's expert testimony as reliable, informative, and devoid of self-interest.

C. Dr. Thomas David

This Court found Dr. David to be less forthcoming, with a self-interest that became notable to the Court. Dr. David testified that he wanted to "control the narrative" in this case. (E.M.N.T. 113.) He sometimes failed to answer questions directly. (*See, e.g.*, E.M.N.T. 59-63 (testifying that giving indirect answers to questions provides the witness with "wiggle room").) Moreover though, Dr. David noted the only thing the [new] guidelines really changed was the terminology used in his analysis [EMNT. 127]. The Court finds this statement incredulous in light of the evidence produced in this case. For instance, Dr. David's trial testimony that an injury to the victim was a probable bite mark (EMNT. 70-71, 87) and that the Defendant was the probable source of the injury to the victim to a reasonable degree of scientific certainty (emphasis added) (EMNT. 72-73, 77), yet under the new guidelines he could not even conclude that that injury was a bite mark, much less to a comparison (EMNT. 129). The defense testimony and evidence in this case is profound and leads one to conclude that bite mark evidence is no longer a valid subject of scientific inquiry unless it can exonerate one or exclude a particular person. To describe the change in the ABFO stance on bite mark evidence as one involving mere "terminology" is at best disingenuous. The Court credits Dr. David's testimony only to the extent it is corroborated by the other credible evidence and expert testimony.

On the most critical questions in the case, Dr. David agreed with the other experts who testified at the hearing. Specifically, when questioned by the Court and Denton, Dr. David admitted that today his testimony would be different than the testimony he gave at Denton's trial. (E.M.N.T. 126.) Dr. David admitted that, today, he would not even compare the marks on the decedent with the teeth of Denton, because it is uncertain as to what caused the injury at all:

> Q: In this case when you testified, you testified that the mark on Mr. Garner was a probable bite mark.
>
> A: Correct.
>
> Q: Under today's guidelines -- applying today's guidelines, you wouldn't do a comparison.
>
> A: That is correct, under the current guidelines.

(E.M.N.T. 129.)

The Court finds that Dr. David's testimony supports Denton's position—that the ABFO Guidelines changed since the time of the trial in this case, and if testifying today, Dr. David would follow the Guidelines i.e., his testimony today would be different than his original trial testimony.

I. Application of the Facts to the Law

A. The Evidence Came to Denton's Knowledge Since the Trial.

This Court finds that the recent changes in the field of bite mark analysis, which led to the 2016 change in the ABFO Guidelines, and the corresponding change of the trial testimony in Denton's case, have come to Denton's knowledge since trial. In 2016, for the first time in the forty-year history of the ABFO, the organization prohibited probabilistic or individualization testimony in the field of bite mark analysis and comparison. This change, which occurred after Denton's trial, means that the evidence offered at trial would be altogether different today.

The evidence at trial was that Denton was the "probable biter" of the "probable bite mark" on Garner and that Garner was the "probable biter" of the "bite mark" on Denton. (T. 154, 159, 167.) At trial, Dr. David rendered those opinions with a reasonable degree of scientific certainty. Now, however, Denton's experts and, ultimately, Dr. David, agree that, under the new Guidelines, the following new expert testimony would be presented at a trial today:

1) Dr. David would no longer compare the injury to Garner to any suspected dentition;

2) Dr. David would no longer testify that the injury to Garner was a bite mark;

3) Dr. David would no longer testify that Denton was the "probable biter";

4) The best Dr. David could say is that Garner "could not be excluded" as the source of the injury to Denton.

(*See, e.g.*, E.M.N.T. 75-78.) Today, therefore, the most that could be offered, consistent with the best practices reflected in the ABFO Guidelines, is that any person's given dentition cannot be excluded as one of innumerable possible dentitions to have potentially inflicted a given injury. Such an opinion will seldom, if ever, be probative of one having inflicted a particular bite mark, nor shall it likely be of any aid to a jury in reaching a decision. The future admissibility of such evidence is dubious at best.

The changes to the ABFO Guidelines constitute newly discovered evidence, as courts across the country have found. *See, e.g.*, *Ex Parte Chaney*, 563 S.W.3d 239, 260 (Tex. Ct. Crim. App. 2018) ("[T]he 2016 ABFO Manual has completely invalidated any population statistics, regardless of whether the population is open or closed . . . the Manual no longer allows examiners to give opinions to a 'reasonable degree of dental certainty.'"); *State v. Hill*, 125 N.E.3d 158, 168 (Ohio Ct. App. 2018) (the "trial court's own statements acknowledge[ed] that the [discrediting of] bite mark evidence is newly discovered evidence"); *Commonwealth v.*

Kunco, 173 A.3d 817, 821-22 (Pa. Super. Ct. 2017) (citing post-conviction testimony by three ABFO Diplomates that acknowledged that the change in the ABFO Guidelines represents a change in scientific understanding of the limitations of bite mark evidence, and that it is impossible to know how many people might be associated with an alleged bite mark).

The Texas Court of Criminal Appeals recently set aside a conviction that had been based on bite mark evidence. *Ex Parte Chaney*, 563 S.W.3d 239 (Tex. Ct. Crim. App. 2018). The Texas court reasoned that "the body of scientific knowledge underlying the field of bite mark comparisons evolved in a way that discredits almost all the probabilistic bite mark evidence at trial." *Id.* at 257. In reaching the conclusion that there was new, material evidence before the court, the *Chaney* court cited to the National Academy of Sciences Report, the new ABFO Guidelines, and studies and affidavits by forensic dentists similar to those that Denton has cited to this Court.[3] And the State of Texas conceded that the new "'bite mark evidence, which once appeared proof positive of . . . Chaney's guilt, no longer proves anything.'" *Id.* at 258. Likewise here—the new bite mark testimony no longer proves anything.

At the hearing, and in its post-hearing brief, the State advanced two counterarguments. The Court is not persuaded by either argument.

First, the State argued that Dr. David's testimony today would be unchanged. However, the State also conceded in its post-hearing brief, that "under the new ABFO Guidelines [Dr. David's] opinion about the injuries on the defendant would change from the [decedent] being the 'probable biter,' to the [decedent] 'could not be excluded' as the source of the bite mark." (State's Br. at 17.) In addition, the prosecution agreed that "the probable bite mark [Dr. David] found on the victim would be considered inconclusive under the new guidelines, and [Dr. David]

[3] Denton and the expert witnesses cited the Court to governmental reports that addressed bite marks. They confirm and corroborate the significance of the new research Denton presented at the hearing.

should not do a comparison on that injury unless he could explain his reasons for deviating from the new guidelines." (State's Br. at 17.) These concessions undermine the prosecution's position that the testimony would be unchanged. Therefore, the Court credits the testimony of the expert witnesses who testified at the hearing (including Dr. David, who was also the State's witness at Denton's trial), who agreed that, under the new Guidelines, the dental testimony at trial today would be fundamentally different. This constitutes new evidence.

Second, the prosecution argued that the change in the ABFO Guidelines, which led to the change in the opinion Dr. David would render in this case and the opinion of Denton's forensic dentists, does not constitute "new" evidence. (State's Br. at 16.) The prosecution claimed that "[c]hanges or updates in scientific guidelines that are used by experts, especially when these changes are not to be applied retroactively, are not new evidence." (State's Br. at 16.)[4] The Court does not find the prosecution's argument persuasive. The prosecution cited no authority in support of this contention, and the Court has found none. Rather, new scientific Guidelines that create a consensus among prosecution and defense forensic experts that the forensic evidence is no longer inculpatory, is a prime example of "new" evidence. Moreover, a focus on scientific policies, guidelines, techniques, and procedures are not key evidence upon which convictions are based, it is the "expert opinion" evidence generated from the application of such policies, guidelines, techniques, and procedures. This record is clear that the expert opinion evidence has changed. Additionally, it is clear that the ABFO guidelines changed due to the realization that bite mark evidence is inherently unreliable.

[4]This Court notes that it is the role of jurist to decide how changes in testimony by expert witnesses in compliance with changes in scientific understanding, procedures, techniques, and procedures shall be applied (i.e., retroactively as newly discovered evidence, as in the present case). Of course, scientist and boards may elect to apply changes and new techniques, understanding and procedures retroactively to their field of endeavor or not and such has no bearing on the courts. It is for the courts to decide the impact of such changes.

A. It Was Not Owing to the Want of Due Diligence that Denton Did Not Acquire the New Evidence Sooner.

The Court finds that Denton acted with due diligence in filing her extraordinary motion for new trial for a number of reasons. First, she filed in 2017, following the change in the ABFO Guidelines, which occurred in 2016. The ABFO has been in existence for more than forty years, and that change marked the very first time in its history that probabilistic and individualization testimony, like that offered by Dr. David at trial, was disallowed. By filing as soon as she did after that "seminal" change, Denton acted with due diligence.

Second, Denton filed her motion in this case prior to numerous decisions that have since granted relief based on the change in the ABFO Guidelines and new understanding regarding the limitations of bite mark evidence. *See, e.g.*, Order on Defendant's Motion to Stay Execution of Sentence, *Commonwealth v. Gary Cifizzari*, No. 8385-CR-4051, at 2 (Super. Ct. Worcester Co. July 12, 2019); *State v. Roden*, 437 P.3d 1203 (Or. 2019); *Ex Parte Chaney*, 563 S.W.3d 239 (Tex. Ct. Crim. App. 2018).

Third, the Court is aware of the many, and increasing, exonerations of people wrongfully convicted based on bite mark evidence of the sort offered against Denton in this case. *See* Innocence Project, https://www.innocenceproject.org/wp-content/uploads/2019/01/Description-of-bite-mark-exonerations-and-statistical-analysis_UPDATED-01.28.19.pdf (last visited Nov. 12, 2019). As far as this Court can tell, none of those exonerations are from Georgia, so she is among the first in the state to raise and litigate this claim.

Fourth, the Court notes that since the hearing in this case, an additional exoneration occurred as well. On July 12, 2019, Gary Cifizzari was released from prison pending further proceedings pursuant to a motion for new trial he filed challenging his 1984 murder conviction. *See* "Cifizzari gets out of prison; seeks new trial in '79 Milford slaying," *Telegram and Gazette*

(July 12, 2019), *available at* https://www.telegram.com/news/20190712/cifizzari-gets-out-of-prison-seeks-new-trial-in-79-milford-slaying. The same Dr. Freeman and Dr. Pretty who offered affidavits and testimony in this case also offered affidavits in Cifizzari's case. In granting Cifizzari's release, the judge cited the forensic odontologists who are "condemning bite mark comparison evidence as *there is no scientific basis for forensic odontologists to proffer testimony concluding that a suspect is 'the biter' to the exclusion of all others.*" Order on Defendant's Motion to Stay Execution of Sentence, *Commonwealth v. Gary Cifizzari*, No. 8385-CR-4051, at 2 (Super. Ct. Worcester Co. July 12, 2019) (emphasis added).

In light of all the above, the Court finds Denton exercised due diligence in filing an extraordinary motion for new trial in 2017, following the significant 2016 change in the ABFO Guidelines.

B. The New Evidence Is So Material that It Would Probably Produce a Different Verdict.

The Court has reviewed the entire trial record in this case in light of the new evidence. After that review, the Court finds the materiality prong of *Timberlake* satisfied because the new evidence is so material that it would probably produce a different verdict.

First, the prosecution conceded at trial that without the bite mark evidence, Denton would have been acquitted. In his closing argument, the prosecutor argued that if not for the testimony that the decedent inflicted a bite mark on Denton, "I'd have to admit that's reasonable doubt." (T. 434.) As discussed above, the new evidence provided by the experts before this Court established that the bite mark evidence used at trial is now known to be unsupported by science. Rather than purportedly tying Denton to the crime of which she was convicted, the undisputed forensic evidence today would not do so. Dr. David's trial testimony—consistent with science at the time it was given but inconsistent with science today—was powerful evidence that the

prosecutor relied on in urging the jury to convict. Today, the evidence would not support the conclusions that the prosecution relied on to secure a conviction. Without such testimony, the Court agrees with the prosecutor's statement at trial: that Denton probably would be acquitted today.

In its post-hearing brief, the State argues that the new evidence is not material. In making this argument, the State relies on Sharon Jones's trial testimony, including her statements to the police. The Court does not find this argument persuasive.

Jones's claim about Denton's alleged admission came after she herself was accused of murder during an interrogation in which two police officers, according to Jones, "kept saying I did it." (T. 342.) Jones did not originally implicate Denton, she only implicated Denton after being pressured by the police, she admitted to having been under the influence of drugs around the time of the offense, and she admitted, under oath, that she had lied to the police. (T. 336-38, 346-47, 352, 354.)

Significantly, the prosecutor did not rely on Jones's statement in his closing argument to the jury. Instead, the prosecutor essentially undermined the statement's credibility during closing argument. He stated:

> Sharon Shontae Jones . . . [t]hat's who she's smoking crack with. I guess, we could have checked the churches, but I guess we couldn't find anybody there, so we had to get the ones who actually were with her that morning. It would have been easier to go to a church and find people who could come and testify to these things, but they're not out smoking crack cocaine in the early morning hours.

(T. 437.) The prosecution informed the jury that it could not pick its witnesses, but had to live with the witnesses it had, despite their incredibility. Because of that, the prosecution explicitly asked the jury to convict based on the bite mark evidence, saying, "If that's all we had, I'd have

to admit that's reasonable doubt. . . . But then we've got also the bite mark on Sheila Denton." (T. 434.) Employing that logic, and applying the new ABFO Guidelines, today Denton probably would be acquitted.

The State presented no other forensic or physical evidence connecting Denton to the crime. There was no DNA evidence presented. While hair was found in the victim's hand, the State's trial expert determined that the hair belonged to the victim; Denton's hair was not found on the scene. (T. 183, 187-88.) The only other evidence against Denton was that she ran from the police and gave a false name when arrested. These facts do not alter the Court's materiality analysis, however, because they provide no independent affirmative evidence that Denton committed a murder. The materiality prong is satisfied.[5]

In addition, as recently as March of 2019, a court, *with the concession of the State*, found that bite mark evidence should not have been admitted in a child murder case, and reversed the conviction. *State v. Roden*, 437 P.3d 1203 (Or. 2019), involved a murder and child abuse case in which testimony indicated that three children suffered various adult bite marks to several different body parts. *Id.* at 1208. On appeal, the prosecution conceded that admission of the bite mark testimony was erroneous. And the Oregon court agreed:

> [T]he state concedes that the trial court erred in admitting that evidence . . . The state's concession is appropriate . . . The state's odontologist claimed that bite mark identification had undergone testing and peer review and had an error rate of "zero," but he admitted that he could not cite a single peer-reviewed study testing and validating the technique, and he was unable to support his assertion regarding error rates. Meanwhile, defendant cited studies highlighting concerns within the scientific community regarding the high rate of error and lack of objective, standardized results in bite mark analysis and identification.

[5] In addition, Dr. David himself has admitted the persuasive power that bite mark evidence has on a jury once it is admitted at trial with the stamp of authority from a witness deemed to be an expert by the court. In a published article in a respected scientific journal, Dr. David wrote that without his testimony, a defendant against whom he testified would never have been convicted. (E.M.N.T. 59-61, 80.) Likewise, here.

Roden, 296 Or. App. at 615-16 (internal citations omitted). Accordingly, the court reversed convictions for felony murder, murder by abuse, and first-degree manslaughter. *Id.* at 1213.[6]

The recent opinion in *Ex parte Chaney* is also instructive as to the question of whether the verdict today probably would be different. Last year, the Texas Court of Criminal Appeals found the following:

> [The] 2016 ABFO Manual has completely invalidated any population statistics, regardless of whether the population is open or closed . . . The body of scientific knowledge underlying the field of bite mark comparisons has evolved since his trial in a way that contradicts the scientific evidence relied on by the State at trial. New peer-reviewed studies discredit nearly all the testimony given by [the ABFO-certified dentists] about the mark on [the victim's] left forearm and [Petitioner] being a "match."

Chaney, 563 S.W.3d at 260-61. At Chaney's trial, the prosecutor, in closing, argued:

> But, most of all, we have the bite mark. I wouldn't ask you to convict just based on the testimony of the tennis shoes, of the statements Chaney made to Westphalen, or the statements he made to Curtis Hilton. But, by golly, I'm going to ask you to convict on that dental testimony.

Id. at 262. That closing argument bears resemblance to the closing argument the prosecutor made at Denton's trial, namely, "If that's all we had, I'd have to admit that's reasonable doubt. . . . But then we've got also the bite mark on Sheila Denton." (T. 434.) In each case, there was other evidence—including potentially inculpatory statements—that arguably tied the defendant to the crime, but in each case the "linchpin" of the case was the bite mark evidence. *See id.* at 262. Thus, the *Chaney* court granted relief, finding that the prosecution's case would have been

[6] Although this issue is not presented before this Court and so the Court does not reach it, the evidence and expert testimony presented to the court at the evidentiary hearing was so credible that the Court doubts whether bite mark evidence would today satisfy the test articulated in *Harper v. State*, 249 Ga. 519 (1982).

"incredibly weakened" had the "newly available scientific evidence been presented at his trial." *Id.*

Just like in *Chaney*, at Denton's trial the prosecution argued the necessity of the bite mark evidence to a conviction. Just like in *Chaney*, the prosecution's case would have been incredibly weakened by the newly available scientific evidence. Accordingly, just like in *Chaney*, the outcome of trial today probably would be different, and Denton is entitled to a new trial.

C. The New Evidence Is Not Cumulative Only.

The Court finds that the new evidence is not cumulative and further notes that the prosecution has not argued otherwise.

D. Affidavits and Live Testimony Were Presented.

The Court finds that Denton submitted two affidavits and presented live testimony in support of her request for a new trial, thereby satisfying this *Timberlake* factor.

E. The Effect of the New Evidence Is Not Only To Impeach the Credibility of a Witness.

At trial, Dr. David testified that "Denton was the probable source of the probable bite mark" on Eugene Garner and that "Mr. Garner was the probable source of the bite mark on Denton." (E.M.N.T. 72.) Dr. David further testified that he held those beliefs "to a reasonable degree of scientific certainty." (E.M.N.T. 72-73.) The new evidence does not simply impeach those conclusions; rather, the new evidence demonstrates that Dr. David would not draw those conclusions, nor testify to those conclusions today. Instead, Dr. David would follow the ABFO Guidelines. As a result, he would not do a comparison between Denton's dentition and the injury to Garner at all, because he would not conclude that the injury to Garner was a bite mark in the first place. (E.M.N.T. 129.) As to the mark on Denton, the most Dr. David would offer is

that any person's dentition, including Garner's, could not be excluded as one of an unquantifiable number of possible dentitions that could have inflicted the injury. (E.M.N.T. 77.)

The following exchanges occurred at the hearing during the examination of Dr. David, and are determinative of this prong:

> Q: Under today's guidelines – applying today's guidelines, you wouldn't do a comparison [to the injury on Mr. Garner]?
>
> A: That is correct, under the current guidelines.

(E.M.N.T. 129.)

> Q: Today, consistent with the guidelines, the strongest conclusion you could come to would be that Mr. Garner could not be excluded as having made the bite mark [on Sheila Denton], correct?
>
> A: That he couldn't be – yes, correct.
>
> Q: That would be the strongest association you could make under today's guidelines, correct?
>
> A: Under the current guidelines, that is correct.

(E.M.N.T. 77.)

The other experts presented at the hearing reiterated these inarguable conclusions in straightforward testimony. For example, with respect to the injury to Mr. Garner, Dr. Brzozowski testified:

> Q: What if you determine that the injury is a probable bite mark?
>
> A: You stop. No further analysis. No comparison is done.
>
> Q: Is that even a permitted conclusion today, probable bite mark?
>
> A: No, it's not.

(E.M.N.T. 157-58.)

In other words, the testimony at trial was that Denton was the probable source of the probable bite mark on Garner, an opinion Dr. David held to a reasonable degree of scientific certainty. Today, all that could be said of the injury is that it is "inconclusive" as to how it was inflicted; no comparison would be done to any dentition.[7] Rather than a "bite mark," the injury to Garner, today, would be called just that, an "injury." That is not impeachment, it is substantively different expert testimony that would not incriminate Denton.

Dr. Freeman analogized to another feature-comparison discipline at the hearing:

> [W]e should all have some level of agreement as to whether or not the injury we are looking at, the threshold, that that injury is a bite mark. And as an example I would give, fingerprint examiners often will disagree about who has made that fingerprint, who attributed that fingerprint. They don't disagree over whether or not it is a fingerprint.
>
> . . .
>
> And if . . . we can't establish step one, that something is a bite mark, if you're wrong about that step then surely any conclusion you make attributing a person to making that bite mark would be faulty.

(E.M.N.T. 209, 216.)

Likewise, an opinion that someone is the "probable biter" is dramatically different from an opinion that someone is in a class of an innumerable number of people who potentially could have inflicted the injury. With respect to the injury to Denton, Dr. Brzozowski testified:

> Q: What would be the strongest conclusion that could be offered consistent with the guidelines today?
>
> A: The strongest conclusion was that one could not exclude that individual as being the source.

[7] The overlays that were admitted at the original trial, purporting to sketch out the work Dr. David did during the comparison phase of his analysis, are irrelevant to the question before this Court for this reason. (*See, e.g.*, E.M.N.T. 191.) With respect to Garner's injury, there would be no comparison to undertake.

Q: You said you can not exclude as opposed to probable biter, which would be different conclusions?

A: Yes.

Q: Is that a matter of semantics or is that a difference, a significant difference?

A: Well, it is a significant difference because can not exclude may mean that there might be thousands of other people that could possibly have inflicted the injury.

(E.M.N.T. 165-66.) Dr. Freeman characterized it as follows:

> Making a statement like someone is the probable biter [the testimony at trial], that is significant, versus saying I can not exclude this person as having made this bite mark [the testimony now]. That indicates that the population that could have made the bite mark is very wide spread.

(E.M.N.T. 235.)

In other words, the expert testimony at trial, to a reasonable degree of scientific certainty, was that Garner was the probable source of the bite mark on Denton. Today, even assuming that the injury is a bite mark (a conclusion not supported by the expert testimony before this Court), the most that could be said is that Garner could be one of innumerable people whose dentition could have inflicted that injury. That is not impeachment; it is qualitatively different testimony that no longer implicates Denton to the exclusion of myriad suspects.

Conclusion

When evidence which is deemed to be "scientific" or "expert", it transcends the normal understanding of the lay juror. Courts generally admit scientific evidence and the expert opinions based thereon, if the Court affirmatively determines, "whether the technique has gained general acceptance in the scientific community which recognizes it," Harper v. State, 249 Ga 519, 524-525 (1982). The Court in Harper went on to state, "An evaluation of whether the

principle has gained acceptance will often be transmitted to the trial court by members of the appropriate scientific community testifying as expert witnesses at trial." Id. at 525. What then should the Court do when the experts testify that the scientific principle has lost acceptance in the appropriate scientific community? In the present case, the loss of acceptance within the field of forensic odontology is not disputed. The Harper test is still the law under the new evidence code. Winters v. State, 305 Ga. 229 (2019). The object of the Court's inquiry in Harper was to determine "whether a scientific principle or technique is a phenomenon that may be verified with such certainty that it is competent evidence in a court of law..." Id. At 524. It stands to reason then, that the Harper test shall serve to determine that a scientific principle or technique has become a phenomenon that can not (emphasis added) be verified with the requisite certainty and that it is incompetent evidence in a court of law.

The ABFO's recognition of the inadequacies of bite mark evidence is profound and undisputed. We now know the bite mark evidence presented in Denton's trial was not competent evidence under Harper. The State's attempt to cast this case as involving mere changes in scientific guidelines misses the point. The changes in ABFO guidelines are clearly intended to represent the state of scientific understanding in the field. These guidelines even limit the conclusions that an ABFO diplomat may testify to, presumably due to the inadequacies of bite mark evidence.

An analysis or determination that a given scientific principle or technique is no longer generally accepted in the scientific community, will by definition most often involve a post-trial review. With the current understanding of bite mark evidence in the field of forensic

odontology, the strongest testimony that can be rendered, in favor of the prosecution, is that the defendant cannot be excluded as the biter. Such testimony will likely be deemed highly prejudicial and of little probative value in the future. With the future of such expert opinion and testimony in serious doubt, the question arises as to whether a Harper analysis can and should be allowed retroactively post-trial, as newly discovered evidence. The Court has answered that question in the affirmative. However, another issue is whether due process would dictate that the Court undertake a reverse Harper type analysis where prior scientific evidence, principles, techniques and testimony are essentially de-ligitimized. This analysis may and should occur without the constraints of Drane v. State, and our extraordinary motion for new trial body of law. Proven unreliable scientific evidence should never serve as the basis of a conviction and should be dealt with by the Courts if and when it is found. Applying such an analysis to the facts of this case, it is uncontroverted that bite mark analysis and testimony as existed at the time of Denton's conviction has been proven to be unreliable and not generally accepted within the scientific community of forensic odontology. Therefore, the Court grants the Defendant's motion pursuant to Drane and a reverse Harper analysis.

WHEREFORE, Denton's Extraordinary Motion for New Trial is hereby **GRANTED**. The Defendant shall be remanded to the custody of the Sheriff of Ware County, when this order becomes final.

Date: 2-7-20

Dwayne H. Gillis

Dwayne H. Gillis, Chief Judge
Superior Court, Ware County
Waycross Judicial Circuit